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No. 03-1116

# In The
# Supreme Court of the United States

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**JENNIFER M. GRANHOLM, Governor; et al.,**
**Petitioners,**
**and**
**MICHIGAN BEER AND WINE WHOLESALERS ASSOCIATION,**
**Respondent,**
**v.**
**ELEANOR HEALD, et al.,**
**Respondents.**

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***On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit***

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## REPLY BRIEF FOR THE PETITIONERS

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii
INTRODUCTION ..... 1

I. When State legislation concerns the "transportation or importation" of intoxicating liquors "for delivery or use" in the State, the 21st Amendment controls ..... 3

II. Respondents distort the plain language of the Webb-Kenyon Act and incorrectly infer the importation of a "non discrimination" provision from the earlier Wilson Act. ..... 6

III. Michigan's regulations are necessary for effective alcohol regulation. ..... 9

A. Effective alcohol regulation requires drawing distinctions. ..... 9

B. Federal enforcement laws are no substitute for State regulation and the 21st Amendment Enforcement Act does not evidence Congress's intent not to allow States to regulate out-of-State shipments. ..... 13

C. The staff Federal Trade Commission (FTC) report cited by Respondents is neither credible nor persuasive ..... 16

IV. Effectuation of the plain language of the 21st Amendment as an exception to the Commence Clause does not undermine other valid Commerce Clause applications. ..... 17

A. Bacchus is distinguishable and is not controlling. ..... 17

B. The 21st Amendment creates an exception for alcoholic beverages from traditional Commerce Clause considerations. ..... 19

CONCLUSION ..... 20

## TABLE OF AUTHORITIES

Cases

*324 Liquor Corp. v. Duffy*,
479 U.S. 335 (1986) ..... 18
*44 Liquormart, Inc. v. Rhode Island*,
517 U.S. 484 (1996) ..... 5
*Bacchus Imports, Ltd. v Dias*,
468 U.S. 263 (1984) ..... 17, 18
*Bowman v. Chicago & Northwestern Ry.*,
125 U.S. 465 (1888) ..... 7, 12
*Bridenbaugh v. Freeman-Wilson*,
227 F.3d 848 (7th Cir. 2000) ..... 5, 12
*Brown & Williamson Tobacco Corp. v. Pataki*,
320 F.3d 200 (2nd Cir. 2003) ..... 10
*Capital Cities Cable, Inc. v. Crisp*,
467 U.S. 691 (1984) ..... 3
*Carter v. Virginia*,
321 U.S. 131 (1944) ..... 19
*City of Newport v. Iacobucci*,
479 U.S. 92 (1986) ..... 18
*Clark Distilling Co. v. Western M. R.. Co.*,
242 U.S. 311 (1917) ..... 9
*Craig v. Boren*,
429 U.S. 190 (1976) *reh'g denied*,
429 U.S. 1124 (1977) ..... 5, 11
*Duckworth v. Arkansas*,
314 U.S. 390 (1941) ..... 19
*Dugan v. Bridges*,
16 F. Supp. 694 (D.C. N.H. 1936) ..... 8
*Exxon Corp. v. Governor of Maryland*,
437 U.S. 117 (1978) ..... 10
*Felix v. Milliken*,
463 F. Supp. 1360 (E.D. Mich. 1978) ..... 11
*Garcia v. United States*,
469 U.S. 70 (1984) ..... 3

*H.P. Hood & Sons, Inc. v. Du Mond*,
336 U.S. 525 (1949) ..... 19
*Hostetter v. Idlewild Bon Voyage Liquor Corp.*,
377 U.S. 324 (1964) ..... 5
*Indianapolis Brewing Co. v. Liquor Control Comm'n*,
305 U.S. 391 (1939) ..... 4
*Inturri v. Healy*,
426 F. Supp. 543 (D. Conn. 1977) ..... 11
*James B. Distilling Co. v. Georgia*,
501 U.S. 529 (1991) ..... 18
*Joseph S. Finch & Co. v. McKittrick*,
305 U.S. 395 (1939) ..... 4
*Kronheim & Co. v. District of Columbia*,
91 F.3d 193 (D.C. 1996), *cert. den.* 520 U.S. 1186 (1997). 11
*Leisy v. Hardin*,
135 U.S. 100 (1890) ..... 7, 12
*Mahoney v. Joseph Triner Corp.*,
304 U.S. 401 (1938) ..... 1, 4, 11
*North Dakota v. United States*,
495 U.S. 423 (1990) ..... 1, 5
*Quill Corp. v. North Dakota*,
504 U.S. 298 (1992) ..... 14
*Reid v. Covert*,
354 U.S. 1 (1957) ..... 4
*Rhodes v. Iowa*,
170 U.S. 412 (1898) ..... 8, 12
*Scott v. Donald*,
165 U.S. 58 (1897) ..... 7, 8
*Solorio v. United States*,
483 U.S. 435 (1987) ..... 4
*State Bd. of Equalization v. Young's Mkt. Co.*,
299 U.S. 59 (1936) ..... 1, 4, 5
*Vance v. Vandercook*,
170 U.S. 438 (1898) ..... 8, 12
*Ziffrin, Inc. v. Reeves*,
308 U.S. 132 (1939) ..... 4, 5

Statutes

27 U.S.C. § 122a (e)(1) ..... 15
27 U.S.C. § 201 *et seq.* ..... 15
27 U.S.C. § 203 ..... 13
Federal Alcohol Administration Act ..... 15
Federal Aviation Administration Authorization Act of 1994 (FAAAA), 108 Stat. 1569 ..... 15
MCL 436.1107(2)-(11) ..... 10
MCL 436.1203(1) ..... 15
MCL 436.1203(7)(a) ..... 2
MCL 436.1503(1) ..... 10
MCL 436.1537(3) ..... 13
MCL 436.1541 ..... 10
MCL 436.1916 ..... 10

Other Authorities

49 Cong. Rec. 4291 (1913) ..... 9
49 Cong. Rec. 4292 (1913) ..... 9
49 Cong. Rec. 4299 (1913) ..... 9
49 Cong. Rec. 4447 (1913) ..... 9
The Federalist No. 45, pp 292-293 (C. Rossiter ed. 1961) ..... 20

Rules

Mich Admin Code r 436.1129(3)(a) ..... 10
Mich Admin Code r 436.1133 ..... 10
Mich Admin Code r 436.1135(3)(a) ..... 10
Mich Admin Code r 436.1311 ..... 10
Mich Admin Code r. 436.1705 ..... 12
Sup. Ct. R. 14.1(a) ..... 15

Constitutional Provisions

U.S. Const. amend. XIV ..... 8
U.S. Const. amend. XXI ..... passim
U.S. Const. art. 1, § 8, cl 3 (Commerce Clause) ..... passim

## INTRODUCTION

The Command of Section 2 of the 21st Amendment is clear and unmistakable: the "transportation or importation" of intoxicating liquors into Michigan "for delivery or use therein," "in violation of the laws thereof, is herby prohibited." Respondents' proposed delivery violates Michigan law and because the challenged restrictions implement Michigan's constitutional authority, they are permissible. Respondents can prevail in their challenge only if the plain language of the 21st Amendment and the similar language in the Webb-Kenyon Act is not given effect.

Respondents seek to avoid the fact that 70 years ago the Constitution was amended to vest the individual States with authority to control the importation and transportation of this one product, free from limitations of the dormant Commerce Clause that apply to other products. Immediately after adoption of the 21st Amendment this Court upheld its clear meaning in *Young's Market*[1] and *Mahoney*.[2] It continues to acknowledge that principle in more recent decisions, e.g., *North Dakota v. United States*, 495 U.S. 423 (1990) (plurality opinion).

Michigan decided that in order to effectively supervise the traffic in alcoholic beverages all such beverages coming into the State for sale or delivery had to pass into the hands of in-State licensees over whom Michigan has effective regulatory control. Michigan's decision to only allow *intra*state shipment at retail to consumers by a limited number of licensed in-State wine makers who manufacture their own products is permissible because Michigan has effective and immediate

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[1] *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59 (1936).

[2] *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938).

control over these in-State licensees. Michigan can easily audit and penalize in-State licensees who do not comply with Michigan's extensive regulatory regime.[3] Such a regulatory regime is rationally related to the legitimate governmental goals of ensuring that alcohol distribution is effectively regulated, that taxes are paid, and that underage drinkers do not have ready access to alcoholic beverages.

Much of Respondents' Counter-Statement of the Case is dedicated to a recitation of the status of the wine production industry, the alleged difficulty and cost in working through the State's three-tier system,[4] and the claimed "trend" among the States to allow out-of-State direct shipment of wine.[5] It also refers to a non-record staff report of the Federal Trade Commission (FTC) of questionable credibility. These statements and the staff report of the FTC are not relevant to a

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[3] There are only forty in-State wine makers in Michigan. Michigan does not require that only Michigan wines can be direct shipped by its licensees; rather, Michigan allows controlled direct shipment by the appropriate licensee of any wine once the product is brought under Michigan's in-State regulatory control.

[4] The only Respondent winery in this case is Domaine Alfred, Inc. It claims that Michigan's three-tier system is too costly and burdensome; however, it admitted that its uses three different wholesalers to distribute its products in other States and that it has never even attempted to enter the Michigan market or inquire about how it can enter that market. C.A. App. 193-194, 473 (Domaine Interrog. Ans. 1, 3-5), D.C. R 81, Ex C. Although the Respondent consumers claim that Michigan should have no problems with tax collection, they took the 5th Amendment when asked if they ever had alcoholic beverages shipped from a seller not licensed to sell alcohol at retail in Michigan and if they paid taxes on those beverages. C.A. App. 372-373 (Ans. to Interrog., 7). Many of the wines they sought were available in Michigan. C.A. App. 315-318 (Wendt Aff'd.). Consumers can also personally transport a case of wine into the State without going through the three-tier system. MCL 436.1203(7)(a).

[5] However, 35 States, including Ohio, Michigan, and New York, are asking this Court to uphold the States' laws regulating and banning the out-of-State importation and direct shipment of alcohol inside its borders.

proper analysis of the issue before this Court. If a State regulation concerns "whether to permit importation or sale of liquor and how to structure the liquor distribution system" – "the central power reserved by § 2 of the 21st Amendment," that is the end of the matter. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 715 (1984). No requirement exists that the State regulation be narrowly drawn so as to minimize the burden on commerce, maximize profits for out-of-State wineries, or provide the greatest selection of wines to Michigan consumers. Section 2 expressly empowers States to restrict imports of alcoholic beverages in a manner that the dormant Commerce Clause would not permit as to other products.

## ARGUMENT

### I. When State legislation concerns the "transportation or importation" of intoxicating liquors "for delivery or use" in the State, the 21st Amendment controls.

The 21st Amendment expressly vests control over the commerce in intoxicating liquors to the States:

> The transportation or importation into any State, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. U.S. Const. Amend. XXI, § 2.[6]

Statutory and constitutional construction rules require giving effect to the ordinary meaning of the language used. *Garcia v. United States*, 469 U.S. 70, 75 (1984). If the plain

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[6] Respondents fail to even quote the 21st Amendment in their 48-page brief. Strikingly, they concede that the "literal terms" of Section 2 suggest "all encompassing power" to the State but then argue that the literal terms don't mean what they say. Resp. Br., 18-19.

language is unambiguous, judicial inquiry ends, except in "'rare and exceptional circumstances.'" *Id.* Indeed, this Court "has constantly reiterated that the language of the Constitution where clear and unambiguous must be given its plain evident meaning." *Solorio v. United States*, 483 U.S. 435, 454 n. 3 (1987) (quoting *Reid v. Covert*, 354 U.S. 1, 8 (1957) (plurality opinion)). *Id.*

Shortly after the 21st Amendment's ratification by the States, this Court was called upon to interpret it in cases challenging "protectionist" State liquor laws.[7] As in the present case, the challengers in those cases argued that the 21st Amendment could not, in view of the dormant Commerce Clause, be used to treat imported liquor differently than in-State liquor. The Court concluded that such a construction would be a "rewriting" of the 21st Amendment. *Young's Market*, 299 U.S. at 62. This Court later declared that *Young's Market* had settled the question that "under the Amendment, discrimination against imported liquor is permissible." *Mahoney*, 304 U.S. at 403. This Court has never overruled the *Young's Market* line of cases with respect to a State's 21st

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[7] *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59 (1936) (California's discriminatory $500 license fee for the privilege of importing beer from outside the State was upheld against a Commerce Clause challenge; *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938)(upholding Minnesota statutory limitation on the types of blended spirits imported into the State, which was not imposed upon those produced in-State); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939)(upholding a Michigan statute that prohibited the importation of beer into Michigan from distributors in States that did not allow unrestricted importation of alcohol products manufactured in Michigan); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 397-398 (1939)(upholding a Missouri ban on the alcohol imports from States that themselves had discriminatory import policies, Justice Brandeis held the alleged discriminatory intent of the Missouri statute to be entirely beside the point); and *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939)(upholding Kentucky Act that imposed rigorous conditions on the transport and delivery of liquor).

Amendment right to control its alcohol importation and distribution system. Instead, this Court has repeatedly reiterated that this is "a regulatory area where the state's authority under the Twenty-first Amendment is transparently clear." *Craig v. Boren*, 429 U.S. 190, 206-207 (1976) *reh'g denied*, 429 U.S. 1124 (1977) (citing *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 and n. 9 (1964)).

Respondents' argument that the *Young's Market* line of cases and the decision in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000), did not involve "discriminatory" State liquor laws (*i.e.*, laws that drew distinctions within the challenged regulatory systems) simply does not square with the facts or holdings in those cases. Each of them involved "discriminatory" State Liquor laws that were upheld under the 21st Amendment. See No. 03-1120, MB&WWA Br., 4, 5, 12, 15-16, 24-27.

More recent decisions of this Court do not put this power of the States in question. Nor do they suggest that the plain language of the 21st Amendment, granting the States the power to control their alcohol importation and transportation system, is problematic. *North Dakota v. United States*, 495 U.S. at 431 (States have "'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system.") *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514-515 (1996) (Section 2 delegated to the States the power "to prohibit commerce in" alcoholic beverages and further said that State "regulatory power over this segment of commerce is therefore largely 'unfettered by the Commerce Clause'" citing *Ziffrin, supra*).

## II. Respondents distort the plain language of the Webb-Kenyon Act and incorrectly infer the importation of a "non discrimination" provision from the earlier Wilson Act.

Respondents assert, Resp. Br., 22-25, 32-35, that like the Wilson Act, the Webb-Kenyon Act evidences a Congressional intent that out-of–State shipments of alcoholic beverages may not be treated differently than in-State shipments. That contention is simply wrong, as can be seen from a comparison of the words of the two Acts and the history that resulted in the need for Webb-Kenyon.

The Wilson Act, 27 U.S.C. § 121, was enacted in 1890 and provides, in part:

> All . . . intoxicating liquors . . . transported into any State . . . *shall upon arrival* in such State . . . be subject to the operation and effect of the laws of such State . . . enacted in the exercise of its police powers, *to the same extent and in the same manner as though such* . . . liquors had been produced in such State . . . . (emphasis added)

The Webb-Kenyon Act, 27 U.S.C. § 122, was enacted in 1913[8] and provides, in part:

> The shipment or transportation, in any manner or by any means whatsoever, of any . . . intoxicating liquor of any kind form one State . . . into any other State . . . to be received . . . sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is hereby prohibited.

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[8] The Webb-Kenyon Act was re-enacted in 1935, after the repeal of Prohibition by the 21st Amendment. The Wilson Act was not re-enacted.

Comparison of the two Acts plainly shows that the Webb-Kenyon Act does not contain the qualifying language set forth in the Wilson Act that imported alcoholic beverages had to be treated in the same "manner as though such liquids or liquors had been produced in such State." Webb-Kenyon actually gave States the right to regulate imported alcoholic beverages in a manner that would not have been permitted under the Wilson Act. A review of the jurisprudence that led to these two statutes confirms that Congressional intent.

Following this Court's decision in *Leisy*,[9] when Congress attempted to free State regulation of alcoholic beverages from the limitations imposed by *Bowman*[10] and *Leisy*, it was initially concerned that States not use their newly liberated power to enact discriminatory legislation. Thus, the Wilson Act, by its explicit terms, did not permit different treatment of alcoholic beverages originating out-of-State since it only removed dormant Commerce Clause protection from shipments of alcoholic beverages upon arrival in the State.

Later in *Scott v. Donald*, 165 U.S. 58 (1897), the Court invalidated South Carolina legislation limiting the permitted mark-up in State dispensaries of in-State wine while not so limiting the mark-up of California wine and prohibiting the direct importation of wine to consumers. The only objection to the challenged legislation was that it violated the dormant Commerce Clause. "We cheerfully concede that the law in question was passed in the bona fide exercise of the police power." *Id.* at 91. The otherwise valid legislation, enacted

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[9] *Leisy v. Hardin*, 135 U.S. 100 (1890)(could not regulate the importation or resale of alcohol as long as the alcohol remained in its original package).

[10] *Bowman v. Chicago & Northwestern Ry.*, 125 U.S. 465 (1888)(could not restrict the importation of liquor to persons possessing a permit).

under the police power, was not saved from dormant Commerce Clause challenge by the Wilson Act because it neither banned the manufacture and sale of intoxicating liquors within the State nor did it apply uniformly to in-State and out-of-State products, as the Wilson Act required. *Id.* at 100.

The next year in *Vance v. Vandercook*, 170 U.S. 438 (1898), the Court was confronted with a challenge to a revised South Carolina dispensary law without the discriminatory mark-up provisions and with a limitation rather than a prohibition of the right to receive out-of-State shipments of alcoholic beverages for use but not for sale. Quoting at length from *Scott*, the Court rejected the claim that the dispensary law was discriminatory. The Wilson Act had been interpreted in *Rhodes v. Iowa*, 170 U.S. 412 (1898) as not applying until shipments were received by the consignee, so the limitation on direct receipt was ruled unconstitutional under the dormant Commerce Clause. *Vance*, 170 U.S. at 451-452.

The Wilson Act still left the States unable to regulate alcoholic beverages effectively, since their policies could be legally frustrated by shipments from out-of-State. In *Dugan v. Bridges*, 16 F. Supp. 694, 704 (D.N.H. 1936) the distinction between the Wilson and Webb-Kenyon Acts is well recognized. There a three-judge court, in rejecting a Commerce Clause and Fourteenth Amendment challenge to a New Hampshire law conditioning importation of alcoholic beverages to in-State wholesalers upon the manufacturer's receipt of a certificate of approval, wrote of the Webb-Kenyon Act:

> This act in its original form contained the same language that was used in the Wilson Act to prevent discrimination against out-of-state products . . . . [citation omitted] In the act as finally passed, the restrictive language does not appear. Its omission seems important. It shows an intent to give the states

> an entirely free hand in regulating the importation and transportation of liquor. *Id.* at 704.
>
> The Court then observed:
>
> There appears to be no prohibition in the act against discrimination between liquors produced within the state and those produced outside the state. *Id.*

The Webb-Kenyon Act was passed only after President Taft first vetoed it on constitutional grounds. See 49 Cong. Rec. 4291-4292, 4299, 4447 (1913). President Taft had vetoed the Act, criticizing it for permitting "the states to exercise their old authority, before they became states, [*i.e.* before ratification of the Constitution] to interfere with commerce between them and their neighbors." See 49 Cong. Rec. 4292. The Webb-Kenyon Act was intended to and did permit effective State regulation. It did so in a way that protected from dormant Commerce Clause challenge legislation that might be criticized as 'discriminatory.'[11]

## III. Michigan's regulations are necessary for effective alcohol regulation.

### A. Effective alcohol regulation requires drawing distinctions.

Respondents object to Michigan's alcoholic beverage regulatory scheme because they claim it makes a "discriminatory" distinction between out-of-State and in-State

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[11] In *Clark Distilling Co. v. Western M. R. Co.*, 242 U.S. 311, 325 (1917) this Court held that the "[Webb-Kenyon] act did not simply forbid the introduction of liquor into a State for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law."

wineries. However, Michigan rationally decided that effective alcoholic beverage regulation requires this distinction is necessary.[12]

The 21st Amendment and the Webb-Kenyon Act authorize Michigan to channel out-of-State shipments of alcohol to licensed wholesalers in order to achieve regulatory control through a transparent and accountable distribution system. For regulatory control out-of-State shipments are simply not the same as in-State ones.[13] Michigan has rationally determined that it cannot effectively track out-of-State direct shipments to prevent illegal alcohol sales, collect taxes, or take meaningful enforcement action (*i.e.* it cannot effectively close out-of-State businesses that violate its laws). Michigan does not discriminate against out-of-State wines. The Michigan market is open to out-of-State wines and for the most part (like most other States) its wine retail market consists of imported wines.[14] Michigan's regulatory distinctions between out-of-State shipment directly to Michigan residents and in-State

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[12] For example, Michigan's Liquor Code (like every other State) makes many different kinds of distinctions in or between classes of licenses that permit sales and consumption of alcohol. MCL 436.1107(2)-(11). Also see MCL 436.1503(1)(location of alcohol retail licensee must be 500 feet from church or school building); Mich Admin Code r 436.1133 (retail hard liquor business can't be within one half mile of another); MCL 436.1541, Mich Admin Code r 436.1129(3)(a); 436.1135(3)(a) (Restrictions on retailers with gas pumps); Mich Admin Code r 436.1311 (Prohibiting advertising referencing minors); MCL 436.1916 (Restricting Entertainment).

[13] Unlawful discrimination exists only when a State discriminates among similarly situated in-State and out-of-State interests. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125-126 (1978). See also, *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 216 (2nd Cir. 2003).

[14] See http://www.wineinstitute.org/communications/statistics/Sales_03.htm.

shipment to Michigan residents merely reflects the fact that the out-of-State direct shipment operates outside of Michigan's strict regulatory system and the in-State shipment does not.

All states regulate alcoholic beverages more extensively than they do most other products. All states make distinctions among alcoholic beverages when regulating their distribution, sale, or use. The traffic, type of shipment, or use made of one intoxicant may be more harmful to the public peace and health than another. The question whether one intoxicant or its shipment is more harmful, requiring greater restraint, is a question that depends upon a variety of circumstances subject to the exercise of judgment and discretion on the part of each State's Legislature and Liquor Control Commission. In this regard, the 21st Amendment and the Webb-Kenyon Act grant broad authority to the States to regulate the transportation and importation of alcohol. The States' regulatory classifications are not subject to strict scrutiny. This is not to say that the 21st Amendment or the Webb-Kenyon Act empower a State to act with "total irrationality or invidious discrimination" in controlling the distribution and shipment of alcohol. See *Craig*, 429 U.S. at 212-14 (Stewart, J., concurring).[15] Since Michigan's laws regulating the importation, distribution and sale of alcoholic beverages are neither irrational nor invidious, they are constitutionally protected.

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[15] See also, *Mahoney*, 304 U.S. at 403; *Kronheim & Co. v. District of Columbia*, 91 F.3d 193 (D.C. 1996), *cert. den.* 520 U.S. 1186 (1997) (D.C. law that generally forbids alcoholic beverage licensees from storing beverages outside the District upheld as valid under the 21st Amendment); *Felix v. Milliken*, 463 F. Supp. 1360 (E.D. Mich. 1978)(Equal Protection challenge to Michigan's law raising the legal drinking age to 21 upheld); and *Inturri v. Healy*, 426 F. Supp. 543 (D. Conn. 1977)(distinctions in alcohol regulation between dinner theatres, lounges, and cafes are valid).

Although they focus on wine, Respondents' argument boils down to the proposition that under the dormant Commerce Clause, any privilege that Michigan grants to an in-State alcohol beverage licensee must also be granted to an out-of-State entity engaged in the same general profession (e.g., wine maker, retailer, wholesaler, brewpubs). Respondents assert that since Michigan allows in-State wine makers to ship their products directly to Michigan consumers, it must also let out-of-State wine makers ship directly to Michigan residents. Taken to its logical conclusion, that would require that since Michigan allows certain other licensed in-State retailers operating within the three-tier system to directly ship alcoholic beverages to Michigan residents, then any of the hundreds of thousands of out-of-State retailers in alcoholic beverages should also be able to directly ship alcoholic beverages to Michigan residents. This would turn Michigan's and other States' systems upside down. In addition, such a decision could perversely result in the kind of reverse discrimination resembling "that created by *Bowman, Leisy, Rhodes, Vance,* and the original package doctrine a century ago, when States discriminated against in-State sellers, because they could not effectively govern direct shipments from elsewhere." *Bridenbaugh,* 227 F.3d at 854.

The bottom line is that Respondents' goal could lead to a market in alcoholic beverages over which States will have lost effective control. Accordingly, under their theory many States' importation and distribution regulations would be invalid under the Commerce Clause despite the 21st Amendment.[16] For

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[16] Respondents and some of the Amici point to Michigan's Out of State Seller of Wine license (OSSW) as evidence of discrimination or economic protectionism. However, they misunderstand how an OSSW license works and inappropriately compare it to a small Michigan wine maker license fee. An OSSW license is more akin to a license to act as an agent for the out-of-State sale of wine through Michigan's three-tier system. Mich. Admin. Code r. 436.1705, C.A. App. 315-317 (Wendt Aff'd.). A small out-of-State

instance, under Respondents' theory of the law, the reciprocal shipping States they and other *Amici* refer to in their briefs could be struck down under the dormant Commerce Clause since those reciprocal laws discriminate against wineries in States that do not allow direct shipping. See Calif., *et al.*, Amici Br., 1. Even the proposed Model Shipping legislation cited by Respondents would not be impervious to Commerce Clause attack.

### B. Federal enforcement laws are no substitute for State regulation and the 21st Amendment Enforcement Act does not evidence Congress's intent not to allow States to regulate out-of-State shipments.

Respondents and other *Amici* suggest that Michigan can rely upon the 21st Amendment Enforcement Act, 27 U.S.C. § 122a(b) (2004), and the power of the United States Tax and Trade Bureau (TTB)[17] to pull federal permits under 27 U.S.C. § 203 (2004), to enforce compliance with its shipment laws. Resp. Br., 46-47, Mem. of Cong. Amici Br., 1, 28-29. This argument is meritless.

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winery wishing to sell its wine is not required to pay the $300 license fee. It only needs to find one of many OSSW licensees. *Id.* The $25 in-State wine maker fee does not account for all of the additional regulatory costs and local permit costs associated with operating this highly regulated business in Michigan. MCL 436.1537(3). In addition to other requirements, payment of an additional $100 fee must be paid by the small Michigan wine maker for sales and wine tasting at each off-premise location. To sell other beer and wine products, Michigan wine makers must pay an additional $100 license fee. MCL 436.1525(j).

[17] The United States Tax and Trade Bureau was formerly known as the Bureau of Alcohol, Tobacco, and Firearms.

First, as New York and the *Amici* States point out[18], the 21st Amendment Enforcement Act provides for injunctive relief only. Second, when Michigan attempts enforcement action against illegal out-of-State shippers, jurisdictional defenses are raised which are difficult if not impossible to overcome. For instance, when Michigan attempted enforcement efforts against out-of-State manufactures and retailers such as the Great American Beer Club, California Wine Club, the Wine Exchange, Best Buy Wine Club, Pop's Wine and Spirits, and Connoisseur Imports they all claimed Michigan lacked jurisdiction and asserted that *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) prevented the collection of taxes and that the 21st Amendment is no exception.[19] It is no wonder Respondents gloss over *Quill* and suggest that licensing out-of-State shippers would resolve the tax collection problem. Resp. Br., 41, n. 17. However, what constitutional licensing scheme a State chooses to adopt for the out-of-State shipments of alcohol imported into its territory is a legislative choice reserved to the States by the 10th and 21st Amendments.

The suggestion that the TTB will pull an illegal shipper's permit is open to question. TTB, not the State, makes the decision on whether to take action based on whether "there is a continuing, material, adverse impact upon a State through the actions of a basic permittee located outside the boundaries of the affected State" and the "extent of this authority does not extend to situations where an out-of-State retailer is making the shipment into the State of the consumer."[20] "Retailers are not

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18 No. 03-1274, NY Resp. Br., 34, n. 9.

19 C.A. App. 328-355. Also See Amicus Br. of Ohio, *et al.* at 25, No. 03-1274, NY Resp. Br., 34-35.

20 ATF Industry Circular No. 96-3, Direct Shipment Sales of Alcohol Beverages (Feb. 11, 1997) cited in the Br. of Resp., at 46, was modified by a TTB ruling found at: http://www.atf.gov/pub/qtrly_bulletins/ vol2_qb 2000/rulings.pdf.

required to obtain basic permits under the (FAA Act)," Federal Alcohol Administration Act, 27 U.S.C. § 201 *et seq.* *Id.* TTB has also made it clear on its Internet site that for the most part it leaves the regulation up to the States.[21]

Certain *Amici* Congressmen, mainly from the State of California, claim that the 21st Amendment Enforcement Act of 2000, 27 U.S.C. § 122a, somehow reaffirmed that States were not delegated the authority to regulate out-of-State shipments. *Mem. Cong. Amici Br.*, 1-3, 19-21. The fallacy of this argument, of course, is that the Act itself does nothing more than provide an injunctive enforcement method the States can employ against illegal shippers provided they are engaged in a "valid exercise of power" under the 21st Amendment as interpreted by the Supreme Court in conjunction with other provisions of the Constitution. 27 U.S.C. § 122a (e)(1). The statute does not specify what constitutes the 21st Amendment power of the States, it does not specifically exclude States that ban direct shipping from its benefits, and it does not conclude that Michigan law is unconstitutional. That issue is presently before this Court and the 21st Amendment Enforcement Act is not.[22]

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[21] At: http://www.atf.gov/alcohol/info/faq/genalcohol.htm#g5

[22] The Cargo Airline Association Amici assert that the Federal Aviation Administration Authorization Act of 1994 (FAAAA), 108 Stat. 1569, 1605-1607, preempts Michigan's shipment laws pertaining to distribution of alcohol, specifically, MCL 436.1203(1). Cargo Airline Amici Br., 6-24. This assertion, well outside of the terms of the grant of certiorari, Sup. Ct. R. 14.1(a), is untenable. The 21st Amendment protects State importation controls even if Congress should repeal the Webb-Kenyon Act and declare free trade in alcoholic beverages. That is why section 2 was placed in the 21st Amendment. Congress may not evade the Constitution indirectly by deregulating the means by which alcoholic beverages are imported. That argument would prohibit importation controls even for "bone-dry" States, which prohibit the manufacture, sale, and importation of alcoholic beverages.

Michigan categorically rejects Respondents' assertion that the regulatory concerns of the State with respect to out-of-State direct shipments are unfounded. Respondents go so far as to claim that there is no evidence that minors are buying, or would buy, wine or liquor from out-of-State shippers. This is simply wrong.[23] An example of the severity of the problem is shown in recent press reports from the State of Washington. There "a bunch of Gonzaga University students . . . ordered liquor, beer and wine 'on-line' and had it delivered to their door steps without ever being questioned about their age."[24] A demand was made to the Washington State Attorney General to take action against Internet retailers. Similarly, in June of this year, the Massachusetts Attorney General "filed a lawsuit against four Internet retailers from four different States for selling alcohol to minors." *Id.*[25]

### C. The staff Federal Trade Commission (FTC) report cited by Respondents is neither credible nor persuasive.

The staff Federal Trade Commission (FTC) report, cited by Respondents and their *Amici*, claiming that States that allow

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[23] C.A. App. 92-93 (Stewart Interrog. 2). (In one year 3624 controlled buy operations with underage decoys were conducted and 29% of those retailers made attempted sales to the undercover (decoy) minors.) C.A. App. 322-324 (Smith Aff'd.), 325-327 (Mead Aff'd.), 356-360, 448-472. Respondents' assertion that the State does not do inspections is also wrong. (2507 investigations conducted of licensees approving adequate physical plant, building code and sales compliance, and many other factors which of necessity encompass frequent inspections.) C.A. App. 322-324. Also see D.C. R 54, Ex 11, Attach C, (showing enforcement actions against Michigan Wine Makers and Brew Pubs).

[24] At: http://seattlepi.nwsource.com/local/185415_liquor09.html. (Seattle Post-Intelligencer (8/9/04)). For other examples, see Michigan Assoc. of Sec. Sch. Prin., et al., Amici Br., 10-22.

[25] Obtaining jurisdiction over out-of-State entities shipping alcohol is a nightmare. See Pet. Br., 33, n. 24.

out-of-State direct shipments are not experiencing problems, is neither credible nor persuasive.[26] The report is not based upon any independent research studies or findings. It is mainly based on ten States' responses to a questionnaire sent out by the staff of the FTC. Eight of those States had not even conducted investigations on the issue. *FTC Report* at 31-33. The report did note "that Michigan found that '[a]bout one in three websites contacted' (roughly 33%) agreed to sell alcohol to the minor with no more age verification than a mouse click, and that UPS delivery people did not properly verify the recipients' ages." It also noted that other States found that minors can buy wine online. *Id.* at 35. It does not focus on the merits of the tax debate and it relies on a self-serving statement by the Wine Institute (a trade association of pro-direct shipment interests) that its members will comply with the law and pay taxes. *Id.* at 39-40.

## IV. Effectuation of the plain language of the 21st Amendment as an exception to the Commence Clause does not undermine other valid Commerce Clause applications.

### A. Bacchus is distinguishable and is not controlling.

As shown in Pet. Br., 27-29, *Bacchus Imports, Ltd. v Dias*, 468 U.S. 263 (1984), is distinguishable on its facts and, therefore, not controlling. Michigan (like its *Amici* States) respectfully suggests that *Bacchus* was erroneously decided or that it should be limited to its facts, *i.e.*, where a State explicitly disavows any regulatory purpose in alcoholic beverage laws.

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26 FTC, Staff Report, 7/3/03, at: http://www.ftc.gov/os/2003/07/winereport2.pdf. Compare Amicus brief for Ohio, et al, p. 26, describing State concerns and problems.

Respondents' statement that, "Not a single opinion by any Justice has called *Bacchus* into question," is simply incorrect. Resp. Br., 29. See, e.g., *City of Newport v. Iacobucci*, 479 U.S. 92, 98 (1986) (Stevens, J., specifically referenced *Bacchus* in his dissent with whom Brennan, J., joined, when he said in no uncertain terms that the Court has completely distorted the 21st Amendment); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 352-360 (1986) (O'Connor, J., dissenting, joined by Rehnquist, C.J., called *Bacchus* into serious question); and *James B. Distilling Co. v. Georgia*, 501 U.S. 529, 557 (1991) (O'Connor, J., with whom Rehnquist, C.J., and Kennedy, J., joined, stating that "The court's conclusion in *Bacchus* was unprecedented.")

Justice Stevens, dissenting in *Bacchus*, correctly noted that the majority adopted a "totally novel approach to the Twenty-first Amendment." *Bacchus*, 468 U.S. at 286-287 (Stevens, J., dissenting). The proper question then and now "is not one of 'deference,' nor one of 'central purposes'; the question is whether the provision in this case is an exercise of a power expressly conferred upon the States by the Constitution. It plainly is." *Id.* at 287. Clearly, Michigan's out-of-State direct shipment ban falls "squarely within the protection given to" it by the 21st Amendment, "which expressly mentions 'delivery or use therein.'" *Id.* at 280.

Revisiting *Bacchus* would not require reconsideration of any other decision of this Court. It would prevent lower courts from misreading that decision as a general warrant to strike down State regulation of the importation, distribution, and sale of alcoholic beverages because some other State has chosen to live with less effective regulation or because the challenged law does not comport with some other conception of reasonableness.

**B. The 21st Amendment creates an exception for alcoholic beverages from traditional Commerce Clause considerations.**

The late nineteenth century saw the development of an "unedifying history" (*Carter v. Virginia,* 321 U.S. 131, 142, J. Frankfurter, concurring [1944]) of a body of case law that applied a rigid formulation of the dormant Commerce Clause, frustrating State efforts to establish effective alcoholic beverage importation regulations. That analysis treated alcoholic beverages the same as other items of commerce, like cheese, for purposes of Commerce Clause analysis even as it held that the police power of the State otherwise permitted much more extensive regulation of alcoholic beverages than of almost all other products. Congress recognized that alcohol is not like cheese, however, and soon made changes to effectuate the distinctions. The Wilson Act, and subsequently the Webb-Kenyon Act and the 21st Amendment, were each efforts, along different lines, to undue that nineteenth century jurisprudence. Each of those enactments gave States progressively greater control over the importation of alcoholic beverages.

Affirming Michigan's constitutional authority to enforce effectively its regulatory system for the importation, distribution, and sale of alcoholic beverages under the 21st Amendment has no necessary implications for dormant Commerce Clause analysis in general. Citations to Commerce Clause opinions of this Court and quotations from Justice Jackson in *H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525 (1949) are irrelevant. See NBWA Amicus Br., 8 n. 5. In *Duckworth v. Arkansas*, 314 U.S. 390, 397-402 (1941), Jackson, J., concurred in the result, asserting that failure to uphold State laws by reference to the 21st Amendment, instead holding them reasonable under the dormant Commerce Clause, weakened both the 21st Amendment and the dormant Commerce Clause. To him, affirming State alcoholic beverage law by reference to the 21st Amendment was consistent with a

strong dormant Commerce Clause. The 21st Amendment authorizes a constitutional regime for alcoholic beverages that is distinct from that for other products. The Webb-Kenyon Act and the 21st Amendment were clearly efforts to overcome Commerce Clause constraints on the States that this Court had found in its pre-Webb-Kenyon jurisprudence.

Respondents quote James Madison for the principle of a strong economic union but Madison also wrote "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp 292-293 (C. Rossiter ed. 1961). The Respondents are asking this Court to rewrite the 21st Amendment and Webb-Kenyon Act by blue-penciling out powers that have been explicitly given to the States. This Court should decline the invitation.

## CONCLUSION

The decision of the United States Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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